Supreme Court, U.S.
FILED
DEC 5 1983
ALEXANDER L. STEVAS
CLERK

No. 83-656

In the Supreme Court of the United States

October Term, 1983

CARIBE TUGBOAT CORPORATION AND CROWLEY TOWING AND TRANSPORTATION COMPANY,
Petitioners,

vs.

DANIEL T. DUFFY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. WHETHER A FEDERAL QUESTION IS PRESENTED IN THIS PETITION UPON WHICH THIS COURT MAY TAKE JURISDICTION AND, IF SO, WHETHER THE DECISION OF THE COURT BELOW RESTED UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

II. WHETHER THIS HONORABLE COURT MAY REVIEW, BY WRIT OF CERTIORARI, A DETERMINATION OF "HARMLESS ERROR" MADE BY A LOWER STATE COURT IN A JONES ACT AND GENERAL MARITIME CASE.

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STATUTES INVOLVED

1. 3 F.S.A. §59.041 (1965).

HARMLESS ERROR; EFFECT

"No Judgment shall be set aside or reversed, or new trial granted by any court of the state in any cause, civil or criminal on the ground of misdirection of the jury or the improper admission or rejection of evidence or for error as to any matter of pleading or procedure, unless in the opinion of the court to

which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice. This section shall be liberally construed."

2. 28 U.S.C. §2111 (1949).

HARMLESS ERROR

"On the hearing of any appeal or writ of certiorari in any case, the court shall give Judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties."

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case contained in Petitioners' brief at pages 4 and 5 except, of course, with respect to that language which indicates that a "substantial federal question" is presented to the court.

In addition, Respondent adopts from Petitioners' brief, the List of Parties (p. ii), Petitioners' Appendix (pp. A1-A18) and Petitioners' Reference to Official Reporter (p. 1).,

SUMMARY OF ARGUMENT

Respondent contends that no federal question is presented to this Court for its determination. Any federal question at issue in this case was decided in Petitioners' favor by the Florida First District Court of Appeal.

Even if a federal question were framed by this Petition, this Court, as a matter of jurisdiction, should not reach that federal question inasmuch as the holding of the court below rests upon adequate and independent state grounds routinely and uniformly applied to cases within the State of Florida.

No assault upon the uniformity of maritime law is presented by the holding of the Florida First District Court of Appeal. In fact, in applying the harmless error rule to its consideration of this case, the lower appellate court has properly applied its own precedents and the time-honored precedents of the common law. In addition, it has applied the same authority which has previously been recognized by this Court in its holdings on this very issue.

It is Respondent's contention that Petitioners are actually seeking a new rule of law, never before present in the common law, federal or state, or in the maritime law. Petitioners seek a rule whereby error in this particular respect will be reversible in each and every case regardless of the facts and circumstances involved.

Petitioners seek to have this Court substitute its judgment on factual grounds for the judgment of the appellate court below. In doing so, this court would be constrained to follow exactly in the footsteps of the Florida First District Court of Appeal in its holding on the federal question presented and, further, would then be constrained to follow the lower appellate court in examining the record for prejudice and in determining whether the error complained of was harmless. This is not, and has never been, the jurisdiction or proper function of this Honorable Court.

ARGUMENT

I

There Is No Federal Issue Raised Which Would Support This Court's Jurisdiction. The Decision of the State Court Below Rests Solely on Adequate and Independent State Grounds.

In their Petition for Writ of Certiorari to this Honorable Court, Petitioners have styled their request as a Petition For Issuance of Certiorari to the Supreme Court of the State of Florida.

Respondent would note, as is reflected in Petitioners' filing, that the Supreme Court of Florida has denied a similar Petition for Writ of Certiorari taken by Petitioners from the decision of the Florida First District Court of Appeal. The Florida Supreme Court has declined jurisdiction in this case either on discretionary or state constitutional grounds. Therefore, the Florida First District Court of Appeal in this cause is the highest state court from which a decision could be, or was, rendered. Respondent notes that the proper application to this Court is for a writ of certiorari to be issued to the Florida First District Court of Appeal and not to the Florida Supreme Court.

Respondent does not assert that this error on the face of the Petition should be dispositive of the issues in this case but would suggest that Petitioners have misconceived the court to which any Writ of Ceritorari issued by the Supreme Court should be directed.

Petitioners assert that a substantial federal question is presented to this Court because of the failure of the

trial court, as requested, to give an instruction on the non-taxability of any award as mandated by this Court in its decision in *Norfolk and Western Ry. Co. v. Liepelt,* 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980). Petitioners also contend that the failure to give this instruction raises a substantial federal question because the cohesiveness and uniformity of federal maritime law is threatened by the trial court's error in failing to give this instruction.

Respondent concedes that this instruction, as mandated by *Liepelt, supra,* was requested by Petitioners in the trial court, but it was harmless error for the trial court to refuse to give the instruction. Respondent submits, for the following reasons, that a federal question is not now presented to this Court on appeal and that any question, federal or otherwise, is not substantial.

Respondent contends that this Court has no jurisdiction to entertain this case and should exercise its discretion by refusing to take jurisdiction of a non-substantial issue.

Respondent also notes that the non-taxability instruction represents the only issue in the instant case which was also discussed in *Liepelt, supra.* Inamuch as Petitioners were granted the right to cross-examine Respondent's witnesses at trial and to present their own evidence on the issues of inflation and taxes as they applied to computations of future earnings and investments, the other issues decided in *Liepelt* are not present in the instant case, nor have they been advanced here by Petitioners.

On appeal from the trial court to the Florida First District Court of Appeal (see Petitioners' Appendix at pages A13 and A14), the court specifically grounded its

decision on the identical issue here advanced by Petitioners.

The finding of the Florida First District Court of Appeal recognized *Liepelt, supra,* but decided that the failure to give the *Liepelt* instruction was nothing more than harmless error, after reviewing the entire trial transcript.

Thus, on the legal issue presented to it, the Florida court considered *Liepelt, supra,* and decided in Petitioners' favor. As it was required to do, the appellate court then made a finding of fact, or a mixed finding of fact and law, in determining whether the error constituted substantial prejudice to the Petitioners or was harmless.

Clearly, the appellate court below had sufficient evidence of record upon which to base its findings of fact. By reviewing the record and the transcript of the proceedings below, the appellate court had knowledge of the extensive injuries and losses suffered by Daniel Duffy and of the certain future losses, supported by medical testimony, which he would sustain as a result of his injuries, including evidence of required future surgeries, the substantial permanent disability suffered by Mr. Duffy, severe pain and suffering both past and future and a substantial diminution of earning capacity. It was clear to the court below that the evidence of damages sustained by him substantially exceeded the amount of the jury award and that this evidence was largely unrebutted at the trial level. The appellate court had no issue of liability before it. As here, Petitioners appeared before that court as admitted tortfeasors, solely responsible for the injuries and damages sustained by Daniel Duffy, a seaman in their employ.

In weighing the effect of the error in failing to give the subject instruction, the appellate court below acted within the dictates and strictures of Florida statutory law found at 3 F.S.A. §59.041 (1965). That statute, which has been the law of Florida in substantially the same form since 1911 (see Laws 1911, c.6223, §1), specifically required the appellate court, upon finding of error in the "misdirection of the jury," to assess that error with respect to its effect on the rights of the parties and any resulting prejudice thereto.

To the extent that the application of this Florida state statute is a traditional and long-standing rule of procedure, universally applied throughout the state for many years, its application to the trial of a federal cause of action is entirely proper and binding. Petitioners suggest that its application in this case is somehow a devious attempt to undermine Petitioners' federal rights and to avoid or subvert a federal cause of action in the state courts of Florida. Petitioners' position in this regard cannot be factually supported. Whether as a matter of statutory or common law authority, this Court and every court in this nation is familiar with and daily applies, the concept of harmless error. There are few rules in the common law which are more universally recognized and applied.

In view of the decision of the Florida First District Court of Appeal, it is apparent that the first issue facing this Honorable Court in determining whether it has jurisdiction in this matter is the issue of whether a federal question is presented in any form before this court or whether the decision below rests upon adequate and independent state grounds. Here no federal question is presented by the application of the federal common law stated in *Liepelt*. With respect to the alleged erroneous

failure to give the requested instruction, no federal question is presented to this Court by the ruling of the Florida First District Court of Appeal. That court identified a problem and recognized *Liepelt, supra,* but decided that the failure to give the instruction was harmless error. Therefore, any federal question which is now presented to this Court from the decision of the Florida First District Court of Appeal must be a question raised by that court's application of the harmless error doctrine to this particular case.

In applying the harmless error doctrine, the lower appellate court was applying a state rule of procedure and the only issue presented is whether the application of the harmless error doctrine was an independent and adequate state ground on which this decision rests.

It has long been recognized by this Court, in a variety of circumstances involving federal and constitutional questions, that if a state decision, even one involving federal questions, is properly grounded upon adequate and independent state grounds, then the decision cannot be upset, nor jurisdiction taken by this Court. *Fox Film Corporation v. Muller,* 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935); *Herb v. Pitcairn,* 324 U.S. 118, 65 S.Ct. 459, 89 L.Ed. 789 (1945); *Jankovich v. Indiana Toll Road Comm.,* 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed.2d 439 (1965); *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

This well-settled rule, is clearly one which applies even to federal causes of action, including causes of action under the Federal Employers' Liability Act, *Herb, supra.* It is equally clear that, when the decision of the Court below rests upon an adequate and independent state ground, federal courts have no jurisdiction to further

review the case and the action is appropriate for denial of certiorari or dismissal of certiorari improvidently granted.

This principle alone, as clearly and simply stated throughout the years by this Court, should provide the grounds for immediate denial of this Petition. Beyond doubt, any federal question before the lower appellate court was resolved by the court in accordance with the dictates of this Court in its decision in *Liepelt, supra.* It is equally clear that the remaining determination made by the lower appellate court constitutes an independent state ground adequate to support the decision. Whether the application of Florida's harmless error statute is considered to be substantive or procedural is not germane to this Court's disposition of this case. Even where the rights of individuals under the United States Constitution are being considered, it has clearly been held that, whether the grounds of the state action are substantive or procedural, if they are independent of the federal cause of action and adequate to support the state decision, then jurisdiction will not lie. *Wainwright, supra.*

Despite Petitioners' inferential suggestion that the Florida appellate court is in some way undermining the administration of maritime law, a federal cause of action, there is no concrete indication that this is the case. Florida has properly applied a state statute on harmless error which has been applied in that state's appellate courts for many decades, both on statutory grounds and as a well-recognized and universally applied rule of common law. The rule is as much one of a common sense as of common law.

Unlike the situation which faced this court in *Liepelt, supra*, there was no clear evidence of an excessive verdict

for Daniel Duffy. The court in *Liepelt, supra,* went to some length to demonstrate the excessiveness of the verdict in that case from the evidence before it. In fact, the principles which the Court was applying in assessing the excessiveness of the verdict in *Liepelt, supra,* were precisely the same principles, although based on different facts, which were applied by the lower Florida court in the instant case. The only difference is that the lower court in this case, on the facts and evidence of record, found no prejudice to Petitioners by the error which it noted. The verdict was supported by the evidence. In *Liepelt, supra,* that same review of the facts and evidence of record led to a clear, factual conclusion that Petitioners had been prejudiced by the failure to give the requested instruction and by other errors in the trial.

Unlike this Court's deliberations in *Liepelt, supra,* Petitioners here seek to avoid an orderly review of the record with regard to harmless error as was done in the Florida appellate court and to have this court declare that any failure, upon request, to instruct as to the nontaxability of an award is ipso facto reversible error in every instance. This point is further addressed below.

II

Any Issue Raised Is Insubstantial As the Decision of the State Court Is a Decision of Fact Determined in Accordance With the Law Established by the United States Supreme Court.

Petitioners assert throughout their brief that the decision of the First District Court of Appeal in Florida poses a threat of some type to the orderly and uniform application of the general maritime law in this county. However, when this claim is analyzed, it is clear that

the federal law in this case, as set forth in *Liepelt, supra,* has been recognized and applied by the lower appellate court. What Petitioners seem to be requesting is a factual review of the record by the Supreme Court and a redetermination, based upon the facts and evidence of record, as to whether Petitioners have been prejudiced by the application of the harmless error rule. Such a review, on factual issues alone, is not, nor has it ever been, the proper appellate function of the United States Supreme Court.

What Petitioners are actually asking of this Court is a summary declaration that the time-honored principle of prejudice or harmlessness of error can *never* be applied in a Jones Act or general maritime case. Such a proposition is erroneous, as indicated in the cases below.

Since the decision in *Liepelt, supra,* both federal and state courts have applied the harmless error rule to the same issue presently before this Court in this Petition. *Marynik v. Burlington Northern, Inc.,* 317 N.W.2d 347 (Minn. 1982); *Bair v. St. Louis-San Francisco Ry. Co.,* 647 S.W.2d 507 (Mo. banc 1983); *Vanskike v. ACF Industries, Inc.,* 655 F.2d 188 (C.A. 8th Cir. 1981); *Flanigan v. Burlington Northern, Inc.,* 632 F.2d 880 (C.A. 8th Cir. 1980), cert. denied, 450 U.S. 921, 101 S.Ct. 1370, 67 L.Ed. 2d 349 (1981).

In *Flanigan, supra,* the Eighth Circuit Court of Appeals was faced with precisely the same issue which was before the Florida First District Court of Appeal. That court first determined that giving the *Liepelt* instruction was a requirement to be retroactively applied. That being the case, the court had to determine whether the failure to give that instruction, which was error, was prejudicial to the Defendant or merely harmless error. Upon review

of the authorities and of this Court's decision in *Liepelt, supra*, the Eighth Circuit determined that, upon the facts and evidence in the record before it, the failure to give the *Liepelt* instruction was harmless. The judgment was affirmed.

Thereafter, as the citation above indicates, this Court denied a Petition for Certiorari on this very issue arising out of the decision of the court in *Flanigan, supra.*

From the above it appears that the cohesive and uniform application of maritime law and Jones Act causes of action requires that any error, including failure to give the *Liepelt* instruction, be tested for prejudice before such error automatically mandates a reversal. For this Court to now find that the failure to give the *Liepelt* instruction is, in every case, regardless of the facts and circumstances, reversible error, as Petitioners urge, would not serve to insure uniformity in maritime cases but would, in fact, overrule hundreds of years of uniform application of well-known and well-settled rules of common law to such causes of action. Not uniformity, but confusion, would be the result.

Lest there be any doubt that the harmless error principle is applicable, in federal causes of action, to the required *Liepelt* instruction, this Court has provided even clearer guidance than that provided by its denial of the Petition for Certiorari in *Flanigan, supra.* In *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 101 S.Ct. 2870, 69 L.Ed.2d 784 (1981), this Court considered the applicability of the required *Liepelt* instruction to a federal cause of action under the Outer Continental Shelf Lands Act (OCSLA). Faced with a discrepancy between the applicability of state law and federal common law, as represented by the *Liepelt* ruling, this Court remanded

the cause of action to the Texas Court of Civil Appeals for a determination resolving whether state or federal law applied. The Court went on to state that, if the federal common law rule applied and the *Liepelt* instruction was required, then the Texas court should continue its consideration of the case to determine whether the error in refusing to give the *Liepelt* instruction was prejudicial to the petitioner:

> "If the Court decides that it was error to refuse the the instruction, it may then address respondent's argument that petitioner was not prejudiced by the error." *Gulf Offshore, supra,* at 101 S.Ct. 2880.

Clearly then, it has been this Court's intention with respect to the *Liepelt* instruction, that the mandate shall apply, as federal common law, to all federal causes of action. It is equally clear that, once it is established that error has been committed by failure to give the instruction, it is this Court's stated practice that a further determination be made as to any prejudicial effect of the error and that reversal be mandated only where clear prejudice has been shown.

Given the weight and history of this basic common law principle, its application to all causes of action, both state and federal, and the simple logic which it embodies, there can be no serious assertion that the application of the harmless error rule poses a threat to the uniformity and cohesiveness of the maritime law. The contrary is true. Petitioners do not here assert any excessiveness of the verdict or prejudice to them by virtue of the error in failing to give the *Liepelt* instruction, nor can Petitioners do so. That issue was properly raised and disposed of by the Florida First District Court of Appeals and its determination was based upon its review of the entire record and transcript before it.

In effect, what Petitioners here request is a ruling from this Court that, regardless of the circumstances and evidence in a given case, a failure to give the *Liepelt* instruction will constitute reversible error in each and every case, without further examination. Such a rule furthers neither the orderly administration of justice nor the uniformity and cohesiveness of the application of maritime law so highly prized by Petitioners. The institution of such a rule would represent a marked departure from the past uniform application of federal and state maritime law.

This Court needs also to consider the statutory provisions under which review of this case would be granted and consideration of the case on its merits would be carried out. Clearly, the provisions of 28 United States Code §2111 apply the same principles of review for prejudice as are embodied in the Florida statute cited above. It is clear from the reading of that statute that, absent a clear showing of prejudice, there is no issue for this Court's review and that the stricture contained in that statutory provision specifically applies to this Court's consideration of Petitions for Certiorari.

CONCLUSION

Respondent submits that the proper procedure is instead to follow the Florida Supreme Court, finding that there is no justiciable issue which would justify the taking of jurisdiction or the grant of certiorari in a case involving only factual issues resolved by the court below with the record and transcript of trial before it.

For all the reasons stated above, Respondent respectfully requests this Court to deny the instant Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mr. James F. Moseley, Toole, Taylor, Moseley & Joyner, 501 West Bay Street, Jacksonville, Florida 32202, Mr. William R. P. Hogan and Mr. John J. Walsh of the Law firm of Freehill, Hogan & Mahar, 80 Pine Street, New York, N.Y. 10005, by United States Mail this 1st day of December, 1983.

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